Supreme Court, U.S.
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No. 06- 06-204

IN THE

Supreme Court of the United States

AMADEO BIANCHI,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 390 and ROADWAY EXPRESS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case presents an issue of first impression in which the United States Court of Appeals for the Eleventh Circuit, admittedly not finding any precedent in the Eleventh or any other Circuit Court of Appeals for doing so, reversed a jury verdict in favor of Petitioner in this hybrid § 301/ breach of duty of fair representation case on the grounds that Petitioner had waived his right to bring a claim for breach of his Union's duty of fair representation by failing to complain about the arbitrary, capricious and bad faith representation by his appointed Union representative during the contractual grievance proceedings. Neither the Union nor the Employer presented any evidence that Petitioner could have asked for, or been given, alternative representation, or that there was any means by which he could do so; all of the record evidence on this point demonstrates to the contrary. Thus, the Question Presented for Review is as follows:

Whether a union member, who is bound by a collective bargaining agreement to utilize the grievance procedure therein concerning a breach of that agreement by the employer, and to be represented by the union in so doing, can be found as a matter of law to have waived his right to claim that his union breached its duty of fair representation to him when the union representative acts arbitrarily, discriminatorily or in bad faith and the union member fails to raise the representative's misconduct during the grievance procedure, when the party claiming waiver has produced no evidence that there was a method by which the grievant could so complain or that the union member had any right to alternative representation.

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CITATIONS TO REPORTED AND UNREPORTED DECISIONS

1. *Bianchi v. Roadway Express, Inc., et al.*, 441 F.3d 1278 (11th Cir. 2006)

2. *Bianchi v. Int'l Bhd. of Teamsters, Chauffeurs and Warehousemen, Local 390*, 441 F.3d 1287 (11th Cir. 2006)

3. *Bianchi v. Int'l Bhd. of Teamsters, Chauffeurs and Warehousemen, et al.*, Case No. 02-21417-CIV-ALTONAGA/ Bandstra (S. D. Fla. November 12, 2004) (final judgment)

4. *Bianchi v. Int'l Bhd. of Teamsters, Chauffeurs and Warehousemen, et al.*, Case No. 02-CV-21417-CIV-ALTONAGA/ Bandstra (S. D. Fla. July 2, 2004) (magistrate judge's decision and order on Bianchi's Motion for Attorney's Fees and Costs)

5. *Bianchi v. Int'l Bhd. of Teamsters, Chauffeurs and Warehousemen, et al.*, Case No.: 02-21417-CIV-ALTONAGA/Bandstra (S. D. Fla. Dec. 21, 2004) (order affirming magistrate judge's decision an order on Bianchi's Motion for Attorney Fees and Costs)

6.. *Bianchi v. Roadway Express, Inc.*, Case No.: 04-16596-BB (11th Cir. May 9, 2006)(denial of petition for rehearing and rehearing *en banc*)

7. *Bianchi v. Roadway Express, Inc.*, Case No.: 05-10192-BB (11th Cir. May 9, 2006)(denial of petition for rehearing and rehearing *en banc*)

STATEMENT OF BASIS FOR JURISDICTION

This Petition for Writ of Certiorari is being taken from two judgments of the United States Court of Appeals for the Eleventh Circuit, entered on March 9, 2006. The Eleventh Circuit denied rehearing and rehearing *en banc* on both on May 9, 2006.

In Case No. 04-16596, the Eleventh Circuit, in a case if first impression in the United States Courts of Appeals overturned a jury verdict for the Petitioner in a hybrid § 301/ breach of duty of fair representation case on the basis that Petitioner waived his right to bring such a suit by failing to complain about the arbitrary, discriminatory and/or bad faith of his union advocate during the grievance process, with no evidence that he had any means or procedure to do so (the "merits" appeal). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

Because of its decision in the "merits" appeal, the Eleventh Circuit, in Case No. 05-10192 (the "fees" appeal) entered final judgment reversing the district court's award of attorneys' fees and costs without reaching the merits of Petitioner's contention that such fees should not have been limited by the contingency fee agreement between he and his counsel. The Court therefore has jurisdiction over this matter as well, pursuant to 28 U.S.C. § 1254(1), but Petitioner suggests that while the "fees" appeal presents "an important question of federal law that has not been, but should be, settled by this Court" and has been decided "in a way that conflicts with relevant decisions of this Court," the proper remedy here would be for this Court, if it grants Petitioner's Petition and ultimately reinstates the jury verdict on the "merits" appeal, to remand the "fees" appeal so that the Eleventh Circuit can review it on its merits.

STATUTES INVOLVED IN THE CASE

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

CONCISE STATEMENT OF THE CASE

This appeal involved a successful Section 301 (29 U.S.C. § 185)/ breach of duty of fair representation hybrid claim brought by Amadeo Bianchi ("Bianchi") against the Respondents Roadway Express, Inc. ("Roadway") and the International Brotherhood of Teamsters, Chauffeurs and Warehousemen, Local 390 ("Union").[1] The case arose out of Roadway Express's termination of Bianchi's employment as a tractor-trailer driver. Bianchi grieved his termination pursuant to the relevant portions of the collective bargaining agreement in effect between Roadway and the Union. There is no dispute that the collective bargaining agreement provided the exclusive avenue of complaint for Bianchi.

The Union, through Business Agent Don Marr, took Bianchi's grievance to the Southern Region Multi-State Grievance Panel ("Panel") where Marr represented Bianchi. The Panel denied Bianchi's grievance and Bianchi thereafter brought this Section § 301 (29 U.S.C. § 185) "hybrid" claim in the United States District Court for the Southern District of Florida, alleging that the Union breached its duty of fair representation to him and that Roadway terminated him without just cause in violation of the collective bargaining agreement. Bianchi's breach of duty of fair representation claim was based on Marr's handling of Bianchi's grievance in an allegedly arbitrary, discriminatory and/or bad faith manner.

Bianchi's claims were tried to a jury over five days in September 2003. The jury found in favor of Bianchi on all counts. The district court then entered final judgment in favor

1. The Union paid its share of the judgment and voluntarily dismissed its appeal.

of Bianchi, in accordance with the jury's verdict, finding that: 1) the Union "acted in an arbitrary, discriminatory, or bad faith manner in representing Plaintiff, Amadeo Bianchi's ("Bianchi") grievance; 2) "[t]he arbitrary, discriminatory, or bad faith conduct of Local 390 'seriously undermined' the integrity of the grievance process"; and 3) that Roadway terminated Bianchi's employment without just cause.[2] Bianchi then moved for an award of attorneys' fees and costs and expenses of litigation, which the district court granted, but only as to the amount reflected in the contingency fee agreement between Bianchi and his counsel and not according to the lodestar method, which Bianchi had contended was the correct one. Both the Union and Roadway appealed (the "merits" appeal). As noted, the Union paid the judgment against it and dismissed its appeal. Bianchi appealed from the order granting attorneys' fees limited to the amount of the contingency fee (the "fees" appeal).

Below, on the "merits" appeal, Roadway argued that Bianchi had "waived" any breach of duty of fair representation claim by not raising any alleged bias of the grievance hearing panel prior to the start of the hearing. The Eleventh Circuit, however, concluded that Bianchi had waived, as a matter of law, his right to bring a breach of duty of fair representation claim because he never complained about the conduct of Don Marr, Bianchi's Union representative. The only evidence in the record on the issue of whether Bianchi did, or even could have, complained about Marr (as opposed to grievance panel members or an

2. Roadway did not challenge the jury's verdict and the district court's judgment against it on the "just cause" issue. Accordingly, that issue was not before the Eleventh Circuit and is not in issue here. *United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004)(issues not raised in initial brief are deemed waived).

arbitrator) is as follows: Although Bianchi was not comfortable with having Marr represent him, he understood that Marr was the business agent for Roadway and therefore Bianchi had no choice (R. 215-84-85).[3]

Indeed, as Bianchi testified, at the first step of the grievance procedure, Marr "had to be there" because Marr was Bianchi's business agent (R. 215-41). Indeed, Geraldine Pape, the then- President and business manager of Local 390, testified that a business agent's job is to, *inter alia*, process grievances for members (R. 215-104). She further testified that Bianchi had no choice as to whom he could have represent him at the grievance hearings, including before the Panel, "[b]ecause Don Marr was assigned [by the Union] to Roadway. It was his job to take care of Mr. Bianchi." (R. 215-111). Neither Roadway nor the Union presented any evidence to contradict either Bianchi's or Pape's testimony. Nor did they present any evidence of the existence of any mechanism or procedure, either internally within the Union or otherwise, which Bianchi could have utilized to complain about Marr's arbitrary, discriminatory and/or bad faith representation and thus rid himself of Marr in favor of a fair business agent (R. *passim).*

Based upon its reversal of the jury verdict and judgment in favor of Bianchi and its imposition of a judgment for Roadway as a matter of law, the Eleventh Circuit also reversed the district court's award of attorneys' fees and costs without reaching the merits of Bianchi's appeal as to the proper method of computing such fees.

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3. "R." references are to the entries on the Civil Docket Record before the United States District Court for the Southern District of Florida. The first numeral following "R" is to the number of the docket entry; numerals following a hyphen after the docket entry number are to the specific pages within the document.

REASONS FOR GRANTING THE PETITION

As this Court held in *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 652-653 (1965):

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. [footnote omitted]. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. [citations and footnote omitted]. But unless the contract provides otherwise, [footnote omitted] there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. [citations omitted]. . . . And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee **until the employee has attempted to implement the procedures and found them so** (emphasis added).

Clearly, then, an employee aggrieved by his or her employer's breach of the collective bargaining agreement is bound to use the grievance procedure as a first method of redress. *Id.* at 653. Petitioner Bianchi agrees with the Eleventh Circuit that it is settled law that, if a grievant believes that a *decisionmaker*, such as an arbitrator or grievance panel member, is biased or otherwise unqualified to occupy that

role, objection to that individual must be made at the time or the objection is waived. This is the proposition set forth in *Early v. Eastern Transfer*, 699 F.2d 552 (1st Cir. 1983), the principal case relied upon by the Eleventh Circuit. But neither the Union nor Roadway produced any evidence in the instant record which suggests that a procedure or mechanism for a pre-hearing or even mid-hearing objection to the grievant's *union- appointed advocate* not only exists, but would yield the same result and is therefore required as a pre-requisite to bringing a hybrid Section 301/breach of duty of fair representation case.

In fact, this Court has indicated otherwise. In *Clayton v. UAW*, 451 U.S. 679 (1981), the Court pointed out that ordinarily, where, unlike in the instant case, the record evidenced that the union constitution may have provided redress for the grievant's complaint with the union's failure fairly to represent him, the grievant should be required to exhaust those internal remedies before being permitted to bring a hybrid Section 301/breach of the duty of fair representation claim to the federal courts. However, where such exhaustion, even where it exists, cannot grant the grievant the full relief sought, this Court held that the grievant was *not* required to exhaust these internal union remedies before bringing his federal court claim. As the Court held:

> The contractual procedures we required the employee to exhaust in *Republic Steel* are significantly different from the procedures at issue here. In these cases, the Court is asked to require exhaustion of *internal* union procedures. These procedures are wholly a creation of the UAW Constitution. They were not bargained for by the employer and union and are nowhere mentioned

> in the collective-bargaining agreement that Clayton seeks to have judicially enforced.

451 U.S. at 687. Rather, said the Court, such internal exhaustion is limited generally to the conduct of internal union affairs. *Id.*, at 687-688. Nor is there any evidence whatsoever in this record that, had Bianchi in fact presented his concerns with Marr's representation to the Grievance Panel, the Panel could have done anything about it. Therefore, the Eleventh Circuit's decision's procedurally based conclusion, unsupported by any record evidence, that Bianchi "waived" his right to claim a breach of the duty of fair representation after the fact would essentially leave him without a remedy, a result which flies in the face of *Maddox* and *Clayton*.

No other federal court in the country, either district[4] or circuit, has ever held that a grievant's failure to raise his union-appointed advocate's breach of his or her duty of fair representation *during the grievance process* as a matter of law precludes the grievant from then raising it in a hybrid Section 301/breach of duty of fair representation claim in federal court. Such a result is even more egregious when the record admits of no evidence that Petitioner had a prescribed method of raising such a complaint, unlike the grievant in *Clayton*, who arguably had the benefit of the union constitution, did not use it, and was nevertheless permitted

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4. The only exception is the District of Rhode Island's decision in *Hazard v. Southern Union Co.*, 275 F.Supp.2d 214 (D.R.I. 2003), upon which the Eleventh Circuit also relied, which does conclude that failure to raise bias of the union-appointed-advocate does amount to a waiver of any subsequent breach of duty of fair representation claim. That decision, however, relies on *Early* in asserting that proposition, which in fact does not hold that at all.

to proceed with his federal court claim. Indeed, each and every case relied upon by the Eleventh Circuit to support its conclusion that by failing to raise the claim of bias by his union-appointed advocate during the grievance process, Bianchi waived his right to bring a duty of fair representation claim in federal court, discusses waiver not of the union-appointed advocate's misconduct but bias of the decisionmaker only.[5] This is not an accident. The Eleventh Circuit's holding which extends waiver to cases where the grievant fails to raise the bias of his appointed union advocate during the grievance procedure, particularly as here where neither Roadway nor the Union introduced any evidence that there existed a mechanism for doing so, in fact eviscerates the whole hybrid cause of action[6] because there is no alternative to it when the mandatory grievance machinery in the collective bargaining agreement breaks down based on the union's failure fairly to represent its member. Thus, the panel's decision creates a dangerous gap in the labor relations system envisioned by Congress and the federal courts, which leaves an injured grievant without a remedy where Congress and this Court clearly contemplated that he should have one.

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5. The *Hazard* case is again the sole exception.

6. It is axiomatic that to prevail on a Section 301 claim against an employer which breaches the collective bargaining agreement, the claimant must also proved that he or she attempted to exhaust the grievance procedure machinery and that the union which brought the grievance breached its duty of fair representation in that process. *Maddox*, *supra*; *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1981).

CONCLUSION

Based upon the foregoing, Petitioner Amadeo Bianchi respectfully submits that this Court should grant his Petition for Writ of Certiorari to resolve the serious federal question raised by the decision of the United States Court of Appeals for the Eleventh Circuit in the "merits" appeal, and carry the "fees" appeal with the case. In the event that this Court grants Bianchi's petition and subsequently reinstates the jury verdict in his favor, then the "fees" appeal should be remanded to the Eleventh Circuit for decision on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED MARCH 9, 2006

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-16596

AMADEO BIANCHI,

Plaintiff-Appellee,

v.

ROADWAY EXPRESS, INC., a foreign corporation,

Defendant-Appellant,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, LOCAL 390, a labor organization,

Defendant.

March 9, 2006

Before HULL, MARCUS and HILL, *Circuit Judges*.

PER CURIAM:

After thirty-six years of employment as a tractor-trailer driver for defendant Roadway Express, Inc. (Roadway), plaintiff **Amadeo Bianchi (Bianchi)** was terminated. After hearing, a grievance panel upheld his termination. Thereafter, Bianchi brought a hybrid action under Section 301 of the

Appendix A

Labor Management Relations Act, also known as the Taft-Hartley Act, 29 U.S.C. § 185(a)(1947) (hybrid Section 301 claim), against employer Roadway, for breach of a provision of a collective bargaining agreement (CBA), and against the International Brotherhood of Teamsters, Local 390 (the Union), for breach of its duty of fair representation (DFR). Bianchi claimed that the Union, through its business agent, Don Marr (Marr), mishandled his grievance of wrongful termination, among other things, based on political and personal animosity between Marr and Bianchi and in retaliation for Bianchi's membership in Teamsters for a Democratic Union (TDU), a dissident Union organization.

After trial, a jury found that Roadway had fired Bianchi in violation of its CBA. It found that the Union, through Marr, had represented Bianchi arbitrarily, discriminatorily, and/or in bad faith at Bianchi's grievance hearing in breach of its DFR. On appeal, Roadway contends that the jury's finding of Union breach is not supported by the evidence. Roadway claims that Bianchi, with full knowledge of all the relevant facts, waived the argument that Marr represented him in bad faith and with bias because Bianchi chose not to raise this issue before the grievance panel itself, before he received an adverse ruling from the panel.[1]

We agree with Roadway. Based on the following discussion, we conclude that, by remaining silent and by

1. If so, the jury verdict cannot stand and we need not reach the issue of whether or not the introduction of certain evidence was prejudicial to Roadway's case and whether the district court abused its discretion in not granting Roadway a new trial.

failing to raise the issue of bad faith/bias at his panel hearing, Bianchi has waived his right to raise the issue in his claim against Roadway and on appeal. We vacate the jury's award and grant judgment as a matter of law for Roadway.

I. FACTUAL BACKGROUND

The relevant facts are these. Bianchi had worked for Roadway for thirty-six years. He had been a member of the Union since 1959. Bianchi also served as a Union steward, volunteering to aid other Union members.

Bianchi was a seasoned Union man, active in Union meetings and Union politics, well versed in the CBA, and well known for helping other Union members. Bianchi was also a member of TDU.

Marr was the Union's business agent for Roadway. He was Bianchi's Union representative at the panel grievance hearing. The two men had a history of political animosity

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2. To summarize the political animosity, Bianchi claims that Marr complained to other bargaining unit members that Bianchi was wasting Union funds by running for office; that Marr filed election protests against Bianchi for engaging in behavior in which Marr himself was engaging; that Marr berated and denigrated Bianchi to other bargaining union members; that Marr made fun of Bianchi and his supporters; that Marr ripped Bianchi's "palm cards" from voters' hands and threw them in the garbage; that Marr destroyed and discarded Bianchi's campaign materials; that Marr constantly referred to Bianchi as a "motherfucker"; and that Marr screamed at Bianchi to leave an outdoor lunch area as he was in "opposition country."

with each other.[2] Bianchi ran against Marr five times for Union office and once for delegate to the International Brotherhood of Teamsters convention, losing to Marr all six times. In addition to their political rivalries, it was well known that Marr and Bianchi had open and ongoing personal conflicts with each other.[3] Over the years, Bianchi filed several complaints against Marr and the Union leadership.

Bianchi was fired when Roadway determined that he had helped another employee, Issaah "Gerome" Daniels (Daniels) file a fraudulent injury report. Daniels was also terminated. Roadway claims they were both fired for dishonesty and fraud in connection with the injury report. Roadway contends that Bianchi instructed Daniels to claim an off-the-job injury as an on-the-job injury, and to falsify the date of the injury on the form.[4]

Both Bianchi and Daniels claim it was a simple misunderstanding as to the date of the injury put on the form. Both claim that the injury did in fact occur on the job. Each man filed a grievance regarding his discharge.

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3. To summarize the personal animosity, Bianchi claims that Marr repeatedly harassed Bianchi by making faces and by yelling obscenities at him; that Marr constantly mocked Bianchi's political supporters; that Marr told Bianchi many times to his face that he did not like him; that Marr generally referred to Bianchi as "that motherfucker"; and that Marr would tell other Union members that Bianchi was an idiot in the way he helped them with their Union grievances.

4. The details of the injury are not relevant here.

Appendix A

Marr represented each man separately as their grievance proceedings advanced from the local level to the panel hearing level. The grievance panel was comprised of two Union members and two Roadway representatives. Daniels' grievance was heard the day before Bianchi's.[5]

Prior to Bianchi's hearing date, a co-worker informed Bianchi that Marr was only pretending to help him. Bianchi later testified at trial that he had been uncomfortable with Marr representing him, believing that Marr was only "acting" as though he was representing him. Still, at the hearing level, Bianchi did not ask for a different Union representative.

Bianchi contends that Marr's preparation for his panel hearing left him worried about Marr's advocacy. Marr allegedly told another worker that he was merely "go[ing] through the motions" of getting "that motherfucker Bianchi his job back." Marr allegedly refused to call live witnesses, instead choosing to read statements into the record. Bianchi caught and fixed several of Marr's errors in preparation of an exhibit packet. In addition, Marr allegedly refused to push for a joint hearing with Daniels.

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5. Marr allegedly spoke to Daniels prior to his panel hearing, continuing to speak very disparagingly about Bianchi. Marr told Daniels that if Daniels testified that Bianchi had told him to falsify the date of injury put on the form, then Daniels would get off without a hearing. When Daniels refused, Marr said that Daniels had "pissed off" a Roadway official and would now have to go forward with a hearing. During Daniels' hearing, Marr blamed Bianchi for the mix-up with the date of injury put on the forms. He suggested that, while Marr gave Daniels proper advice, Bianchi had confused him. The panel overturned Daniels' termination and reinstated him.

Appendix A

At the close of his grievance panel hearing, Bianchi was asked by a panel member whether or not he had presented all of his evidence. Bianchi responded that he was not fully prepared and wished that he had had live witnesses, but that he had presented everything in his favor. When the panel member asked Bianchi whether Marr had represented him properly and fully, Bianchi replied, "I believe Don Marr represented me properly and fully."

Bianchi never expressed to the panel any reservations that he may have had about Marr's biases or even those of any panelist.[6] On cross examination at trial, Bianchi was pressed on whether it was true or not that he was happy with Marr's representation. He admitted that he lied to the panel. Bianchi claimed that he did not bring up his concerns about Marr's bias to the panel because he did not want to make the panel mad. Bianchi testified: "I figured there is no way they are going to take my job from me. I figure I would just let it [the bias] go."

The panel upheld Bianchi's termination.

II. PROCEDURAL HISTORY

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6. At the time of the panel hearing, Bianchi was also aware of the fact that he did not have a good relationship with one of the panel members but said nothing to the panel. Bianchi stated that the panel "still had two union men and two company men, that if they heard the evidence they would vote in my favor." Immediately after receiving the adverse panel result, Bianchi filed a complaint with the Union claiming that the two Union panel members were biased against him and had upheld his termination solely due to his Union politics.

Thereafter Bianchi filed his hybrid Section 301 claim against Roadway and the Union in federal district court. Before trial, Roadway filed a motion *in limine* claiming that Bianchi had waived his argument that Marr was biased against him and had fixed the panel grievance hearing, by not raising this with the grievance panel itself. The district court denied the motion and the case proceeded for jury trial.

The jury held for Bianchi against both Roadway and the Union, finding: (1) that Roadway had terminated Bianchi without just cause in violation of the CBA; (2) that the Union had breached its DFR by Marr's handling of Bianchi's grievance proceedings arbitrarily, discriminatorily and/or in bad faith; and (3) that the Union's breach materially affected the outcome of Bianchi's grievance hearing.

Roadway then filed a motion for judgment as a matter of law, renewing its contention that Bianchi had waived his bad faith/bias argument, or, in the alternative, a motion for new trial. The district court denied the motions without explanation and entered judgment for Bianchi in accordance with the jury's verdict.

This appeal follows.[7]

III. ISSUES PRESENTED

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7. Although the Union was initially a party to this appeal as well, it withdrew from the appeal via a motion to dismiss its appeal with prejudice. As the Union's breach is an element of Roadway's liability, Roadway can challenge the jury finding without the Union as a party on appeal.

A. Whether the district court erred by denying Roadway's motion for judgment as a matter of law because Bianchi had waived his objection of bad faith/bias by failing to raise it before his grievance panel, and therefore the evidence at trial was insufficient to support a jury finding that the Union had breached its DFR?

B. Whether the district court abused its discretion by refusing to grant Roadway's motion for a new trial on evidentiary grounds?

IV. STANDARDS OF REVIEW

A. Judgment as a Matter of Law

A district court's denial of a defendant's motion for judgment as a matter of law is reviewed *de novo*, applying the same legal standard as the district court. *See Dade County, Fla. v. Alvarez*, 124 F.3d 1380, 1383 (11th Cir.1997). The sufficiency of a hybrid Section 301 plaintiff's DFR allegations is a question of law that is also reviewed *de novo*. *See Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1206 (11th Cir.1982). A ruling on the issue of waiver of arbitration is also reviewed *de novo*. *See Ivax Corp. v. B. Braun of America, Inc.*, 286 F.3d 1309, 1316 (11th Cir.2002).

B. Motion for New Trial

We review the district court's denial of a motion for new trial for abuse of discretion. *See Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F.3d

1460, 1463 (11th Cir.1994).

V. DISCUSSION

A. Judgment as a Matter of Law

1. Waiver

a. Bianchi's Contentions in General and as to Waiver

Bianchi claims that Marr's hostility towards him caused Marr to represent him at his grievance panel hearing in bad faith and in an arbitrary and discriminatory manner. *See Tedford v. Peabody Coal Co., et al.*, 533 F.2d 952, 957 (5th Cir.1976) (citing *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967)); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 577, 583-84 (6th Cir.1994); *Thomas v. United Parcel Service, Inc., et al.*, 890 F.2d 909, 923 (7th Cir.1989). Bianchi contends his hearing was a sham. *See Margetta v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir.1974) (union breaches DFR when proceeding is essentially a sham).

Bianchi claims that the jury verdict is well supported by

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8. Bianchi points to eleven instances of bad faith in the record: (1) that Marr canceled a meeting with another freight company because he had to "go through the motions of getting that motherfucker Bianchi" his job back; (2) that Marr attempted to convince Daniels to blame Bianchi for the mistaken date on Daniels' notice of injury form, in exchange for resolving Daniels' grievance in his favor, eliminating the need for a hearing; (3) that Marr

(Cont'd)

the substantial record evidence and that Roadway is not entitled to judgment as a matter of law.[8] As was discussed at oral argument, Bianchi claims essentially that Marr "lay down on the job."

Bianchi argues that the evidence must be considered in the totality of the circumstances. *See, e.g., Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir.1988). He contends it was clear that Marr was acting in his own self interest, rather than in Bianchi's interest, during the grievance process. *See Ooley v. Schwitzer Div., Household Mfg., Inc. et al.*, 961 F.2d 1293, 1303 (7th Cir.1992)(self-protectionist motives are not appropriate for fiduciaries and constitute sufficient evidence that the Union acted in bad faith); *see also Schoonover v. Consolidated Freightways Corp. of*

(Cont'd)

instructed Daniels to lie to the grievance panel [about Bianchi's involvement]; (4) that Marr refused to entertain Bianchi's request that his and Daniels' grievances be heard together; even though they arose from the same factual circumstances and were heavily interdependent, Roadway's Terminal Manager wanted them heard separately; (5) that Marr refused to call live witnesses despite the fact that Bianchi requested that he do so, instead choosing to read witness statements into the record; (6) that Marr left it to Bianchi to do all the preparation work for the hearing; (7) that Marr twice put Bianchi's grievance packet together incorrectly; (8) that Marr never questioned Bianchi about a critical telephone conversation in which Daniels informed Bianchi that he had been injured on the job; (9) that Marr blamed Bianchi for Daniels' conduct during Daniels' hearing; (10) that when Bianchi attempted to put into the record evidence from Daniels' hearing, a Union panelist stopped him from doing so, and Marr did not object; and (11) that Marr made a false statement to the panel claiming that he did not know that Daniels had told Bianchi that he had been injured on the job.

Delaware, et al., 147 F.3d 492, 496 (6th Cir.1998); *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125, 132-33 (1st Cir.1990) (misrepresentations by union representative can amount to arbitrary conduct).

Bianchi likens his case to *Achilli v. John J. Nissen Baking Co., et al.*, 989 F.2d 561 (1st Cir.1993).[9] The *Achilli* court upheld a finding of bad faith against a Union in a hybrid Section 301 case. The plaintiff in *Achilli* cited a number of pieces of evidence indicative of bad faith, including that his union representative intentionally refused to present certain evidence to the panel. *Achilli*, 989 F.2d at 563-64.

In order to prove that this refusal to present certain evidence was not a DFR breach, the Union in *Achilli* pointed out that the plaintiff could have simply presented the missing evidence himself. *Id. at 564.* The court, through then-Chief Judge Breyer, held that "[t]he district court could reasonably find . . . that the Local's pressure, along with Achilli's dependence upon his representative at the hearing, make his failure to volunteer this information understandable, indeed, less than purely voluntary, and, therefore insufficient to absolve the Local of causal responsibility." *Id.*

Bianchi only spends two-and-a-half pages in his answer

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9. Bianchi distinguishes his case from *Harris*guing that the only issue in *Harris* was whether the union representative had represented the grievant in a perfunctory manner. There was no suggestion in *Harris* that there was deliberate obfuscation in the presentation of the grievant's case to the panel by the Union representative, or that there was a history of personal and political animosity between the two men.

brief on the subject of waiver. He claims waiver is not present for two reasons.

Bianchi first contends that there is no waiver present in his case because his fear that he would "make the union part of the panel mad" excused him from bringing up the bias issue at his hearing. He claims he had no reason to believe that the panel was "fixed" prior to the date of the hearing. Bianchi argues that, at best, he testified that he had some trepidation about a particular panelist because he "used to be Roadway's labor man . . . me and him never got along good." Bianchi also contends that the presence of that particular panelist did not cause him to believe that he could not get a fair hearing. Instead, he testified that "[w]e still had two union men and two company men, [ans so I thought] that if they heard the evidence they would vote in my favor."

Bianchi's second reason that waiver is not present in his case is because he did not realize Marr's bad faith until it "dawned on him" *after* he lost the panel hearing. When asked at trial what made him believe that he did not get a fair hearing, Bianchi pointed to Marr's conduct at the hearing. He admitted his suspicion, that, *in hindsight*, he felt that the proceeding had been fixed from the beginning. Bianchi claims that this suspicion "*reflects an appreciation of events which followed the Panel hearing and dawned on [him] only after he sat down, thought about it, and put it all together. . . .*"

b. Roadway's Contentions as to Waiver

Roadway argues that Bianchi waived his bad faith

argument by failing to raise it with the grievance panel itself. Roadway contends that all the facts relevant to the issue of bad faith/bias were known to Bianchi at the time of the hearing, and that he cannot sit mute and later object to an adverse ruling on that basis. His silence constitutes a waiver of the objection.

In its attempt to establish Bianchi's waiver, Roadway cites to Bianchi's deposition in which he admits that he believed that his hearing was fixed from the beginning.[10] It also highlights that Bianchi filed a protest to the proceeding, claiming that the Union panel members were politically biased against him, on the same day of but after the adverse decision, demonstrating that Bianchi had always thought his hearing was fixed and merely held that issue as his trump card, for later assertion in the event of an adverse decision.

On the issue of waiver, Roadway relies principally on a First Circuit case, *Early v. Eastern Transfer*, 699 F.2d 552 (1st Cir.1983). In *Early*, the First Circuit considered whether two hybrid Section 301 plaintiffs could argue bad faith by the Union. In upholding summary judgment for the defendant, the *Early* court refused to consider the plaintiffs' bad faith/bias argument because of the plaintiffs' "failure to have raised the issue of [the union representative's] purported bias before the joint committee." *Early*, 699 F.2d at 558. In *Early*, the biased person was a union representative on the panel.

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10. As Bianchi's deposition was put in the record as an exhibit to Roadway's motion for summary judgment, it was never admitted at trial and can only be examined in the context of waiver, not sufficiency of the evidence.

The *Early* court determined that, "[i]n the absence of exceptional circumstances, we will not entertain a claim of personal bias where it could have been but was not raised at the hearing to which it applies. This is the accepted rule in arbitration cases." *Id.* (citing *Amalgamated Meat Cutters v. Cross Brothers Meat Packers, Inc.*, 518 F.2d 1113, 1121 & n. 19 (3d Cir.1975); *Morris v. Werner-Continental, Inc.*, 466 F.2d 1185, 1189 (6th Cir.1972); *Cook Industries, Inc. v. C. Itoh Co.*, 449 F.2d 106, 107-08 (2d Cir.1971) *cert. denied*, 405 U.S. 921, 92 S.Ct. 957, 30 L.Ed.2d 792 (1972); *Graphic Arts Int'l Union, Local 97-B v. Haddon Craftsmen, Inc.*, 489 F.Supp. 1088, 1093 (M.D.Pa.1979)).

This principle has also been applied in a hybrid Section 301 case to a biased Union representative in Marr's position. *See Hazard v. S. Union Co.*, 275 F.Supp.2d 214, 225 n. 13 (D.R.I.2003) (plaintiff waived his argument that his Union representative was biased against him "because he knew of the alleged bias at the time of the arbitration and failed to raise it during that proceeding"). Finding no Eleventh Circuit case directly on point, Roadway asks that we follow the rationale of the First Circuit in *Early* and the Rhode Island district court in *Hazard* on the issue of waiver present in this appeal.

2. Waiver Analysis

In the context of a hybrid Section 301 cause of action, the Supreme Court has explained that courts should "not undertake to review the merits" of the underlying grievances, "but should defer to the tribunal chosen by the parties finally to settle their disputes. Otherwise plenary review by a court

of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976) (internal quotation marks omitted). If a Union member fails to utilize the grievance procedure under the CBA to air his grievances, then a district court should not allow him to make such arguments for the first time. *See id.* ("[U]nless he attempted to utilize the contractual procedures for settling his dispute with his employer, his independent suit against the employer in the District Court would be dismissed.").

The burden is on Roadway to prove waiver. *See e.g., Lambert v. Travelers Fire Ins. Co.*, 274 F.2d 685, 687-88 (5th Cir.1961). In order to do this Roadway must show that Bianchi had "full knowledge of the fact" underlying his bias claim. *See Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1204 (11th Cir.1982) ("Waiver applies only where a party has acted with full knowledge of the facts."); *but see University Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1340-41 (11th Cir.2002) (finding no waiver of the argument that the arbitrator was biased where the arbitrator did not disclose all of the information revea ıg the "extensive nature" of the relevant interactions suggesting bias).

Most courts suggest, however, that, where the bias is apparent enough, waiver will occur. *See United Steelworkers of America Local 1913 v. Union R. Co.*, 648 F.2d 905, 913 (3d Cir.1981) ("When the reasons supporting an objection are known beforehand, a party may not wait to make an objection to the qualifications of a Board member until after

an unfavorable award has been made."); *Hazard*, 275 F.Supp.2d at 225 n. 13. This interpretation is the better-reasoned view. If merely adding additional facts to a bias claim were enough to avoid waiver, then waiver could be easily avoidable.

We find *Early* to be persuasive in this case. The key to the ruling in *Early*, as is true in Bianchi's case, was that "[a]ll the facts now argued as to [the committee member's] alleged bias were known to [the plaintiffs] at the time the joint committee heard their grievances. Had the [plaintiffs] objected, [the committee member] might have withdrawn in favor of some other union official." *Early*, 699 F.2d at 558. Additionally, just as occurred in Bianchi's case, "at the conclusion of the hearing [the Earlys] expressly stated that they had been properly represented" by the Union. *Id.* Rejecting the type of argument that Bianchi is attempting to assert here, the First Circuit reasoned that:

> While it may be unpleasant to have to choose between possibly alienating a decisionmaker in advance by objecting and waiving the issue of bias, we cannot accept that parties have a right to keep two strings in their bow-to seek victory before the tribunal and then, having lost, seek to overturn it for bias never before claimed.

Id.; *accord United Steelworkers*, 648 F.2d at 913; *Swift Independent Packing Co. v. District Union Local One, United Food and Commercial Workers Int'l Union*, 575 F.Supp. 912, 916 (N.D.N.Y.1983) (finding waiver present in a Section 301 case where "plaintiff made a calculated decision not to object

to the alleged bias of [an arbitrator]" because he wanted to avoid alienating the arbitrator); *Haddon Craftsmen, Inc.*, 489 F.Supp. at 1093 (it is well settled that "a party may not await an adverse award before asserting objections on grounds of which he had knowledge prior to the award").

The *Early* court held that the plaintiffs had waived their bad faith/bias theory and thus it "could not look behind" the joint committee's award on that basis. *Early*, 699 F.2d at 559; *Hazard*, 275 F.Supp.2d at 225 n. 13. *Early* and *Hazard* strongly support Roadway's waiver argument.

Bianchi's response to Roadway's waiver argument is weak and contradictory. The case he principally relies on, *Achilli*, does not squarely address the issue of waiver. The *Achilli* court was discussing the DFR issue in the context of whether the evidence supported the finding that the Union breached its DFR, not as to whether the DFR argument was waived.[11]

In Bianchi's first rationale of excuse, he claims that there is no waiver present in his case because his fear that he would make the union part of the panel mad excused him from bringing up the bias issue at his hearing. *Early* is clearly on

11. In fact, the *Achilli* court never used the word "waiver" or "estoppel." Both *Achilli* (1993) and *Early* (1983) are First Circuit cases, yet *Achilli* neither references *Early* nor discusses the waiver rules set forth therein.

12. Waiver is more apparent in Bianchi's case than in *Early*. In *Early* there were "no actions or remarks by [the union representative] showing overt hostility or less than conscientious performance of duty." *Early*, 699 F.2d at 559.

point.[12] Excuse is not enough. *See Early*, 699 F.2d at 558 ("While it may be unpleasant to have to choose between possibly alienating a decisionmaker in advance by objecting and waiving the issue of bias, we cannot accept that parties have a right to keep two strings in their bow.").[13]

Bianchi's second rationale of hindsight, that he did not realize Marr's bad faith until it "dawned on him" after he lost the panel hearing, this is not supported by the record. The record reflects that Bianchi admitted at trial that at the hearing he believed Marr was only "acting" as though he was representing him. It is also abundantly apparent that Marr's personal and political animosity, suggesting bad faith and bias, were well-known to Bianchi before the adverse decision by the grievance panel. Despite learning and being advised before the panel hearing that Marr was fixing the hearing against him and only going through the motions of helping him, Bianchi still purposely elected not to bring the subject of bias and bad faith up at the hearing "because he did not have the evidence in writing" and he did not want to make the panel mad.

Thus, Bianchi "made a calculated decision not to object to the alleged bias." *See Swift Indep. Packing*, 575 F.Supp. at 916. In doing so, he lost the right to keep two strings in

13. When a grievance panel member asked Bianchi if he had presented all of the hearing evidence in his favor, and, if he had been properly represented, he answered yes to both questions. During cross-examination at trial, Bianchi admitted that this had been a lie, and that he then thought that Marr and a panel member were biased, and dead set against him. Bianchi testified at trial that he did not raise the issue of bias at the hearing because he did not want to anger the panel. He testified: "I figured there is no way they are going to take my job from me. I figure I would just let it [the bias] go."

his bow. *Early*, 699 F.2d at 558. Waiver is present and the evidence is insufficient therefore to support the jury verdict.

B. Motion for New Trial

Based upon our conclusion that Roadway is entitled to judgment as a matter of law, we need not reach the second evidentiary issue.

VI. CONCLUSION

Based on the foregoing, Bianchi waived his objection of bad faith/bias by failing to raise it before his grievance panel. Therefore the evidence at trial was insufficient to support a jury finding that the Union had breached its DFR. We VACATE the jury verdict in favor of Bianchi and GRANT JUDGMENT AS A MATTER OF LAW for Roadway.

JURY VERDICT FOR BIANCHI VACATED; JUDGMENT AS A MATTER OF LAW FOR ROADWAY GRANTED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10192

AMADEO BIANCHI,

Plaintiff-Appellant,

versus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, LOCAL 390, a labor organization, ROADWAY EXPRESS, INC., a foreign corporation,

Defendants-Appellees.

(March 9, 2006)

Before HULL, MARCUS and HILL, *Circuit Judges*.

PER CURIAM:

In vacating the jury verdict this day in No. 04-16596, for plaintiff-appellee Amadeo Bianchi, and in ordering this day that judgment for defendant-appellant Roadway Express, Inc. be entered, the award of attorneys' fees in the instant case, No. 05-10192, is therefore unauthorized. The judgment of the district court affirming the magistrate judge's order of July 1, 2004, granting Bianchi attorneys' fees against defendant-appellee, International Brotherhood of Teamsters, Chauffeurs and Warehousemen, Local 390, is reversed.

REVERSED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION AFFIRMING MAGISTRATE JUDGE'S ORDER DATED AND FILED DECEMBER 21, 2004

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case No. 02-21417-CIV-ALTONAGA/Bandstra

AMADEO BIANCHI,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, LOCAL 390, a labor organization, and ROADWAY EXPRESS, INC., a foreign corporation,

Defendants.

ORDER AFFIRMING MAGISTRATE JUDGE'S ORDER

THIS CAUSE came before the Court on Plaintiff, Amadeo Bianchi's Objections to the Magistrate Judge's Report and Recommendation on Plaintiff's Initial and Supplemental Petitions for Award of Attorneys' Fees [D.E. 233]. Following a jury verdict in his favor, Mr. Bianchi filed

several motions seeking attorney's fees and costs of litigation [D.E. 167, 168, 177, 225]. These motions were referred to Magistrate Judge Ted E. Bandstra for a final order pursuant to 28 U.S.C. § 636(b)(1)(A) [D.E. 180]. On July 1, 2004, Magistrate Judge Bandstra issued an Order [D.E. 231] granting Mr. Bianchi $27,052.92 in attorney's fees against Defendant, International Brotherhood of Teamsters, Chauffeurs, and Warehousemen, Local 390 ("Local 390"), which he incurred as a result of Local 390's breach of its duty of fair representation. This amount represents 40% of Mr. Bianchi's stipulated damages and equals the contingency fee that Mr. Bianchi owes to his attorneys under their agreement. Mr. Bianchi now objects to this award, arguing that instead of a contingency fee, he is entitled to recover approximately $250,000 as a reasonable attorney's fee computed under the lodestar method.[1]

Non-dispositive orders entered by a magistrate judge without the consent of the parties are not final when objections are filed, and the district judge must therefore consider any objections. *See United States v. Polishan,* 336 F.3d 234, 240 (3d Cir. 2003) ("[A] non-dispositive decision made by a magistrate judge under 28 U.S.C. § 636(b)(1)(A) (as in this case) need not be reviewed by the district court *unless objections to the order are raised.")* (emphasis added); *Donovan v. Sarasota Concrete Co.,* 693 F.2d 1061,1066-67

1. "Lodestar" refers to "[a] reasonable amount of attorney's fees in a given case, usu[ally] calculated by multiplying a reasonable number of hours worked by the prevailing hourly rate in the community for similar work, and often considering such additional factors as the degree of skill and difficulty involved in the case, the degree of its urgency, its novelty, and the like." Black's Law Dictionary (8th ed. 2004).

(11th Cir. 1982) ("Decisions by a magistrate [judge] pursuant to 28 U.S.C. § 636(b) are not final orders and may not be appealed until rendered final by a district court." (citing *Glover* v. *Ala. Bd. of Corr.*, 660 F.2d 120, 122 (5th Cir. Unit B Oct. 1981))). Furthermore, while a motion for attorney's fees is not "'pretrial' at all in the temporal sense, [it] is a motion 'capable of determination without trial of the general issue,' and thus can in a sense be considered pretrial because not related to trial." *Johnson v. Old World Craftsmen, Ltd.*, 638 F. Supp. 289, 291 (N.D. Ill. 1986) (quoting *United States v. Flaherty*, 668 F.2d 566, 586 (1st Cir. 1981)). Because "[t]he 'clearly erroneous or contrary to law' standard of review of Rule 72(a) applies to nondispositive pretrial motions.... that standard also applies to grant and denial of attorneys' fees." *Id. See also Director of Office of Thrift Supervision v. Lopez*, 141 F.R.D. 165, 166 (S.D. Fla. 1992) (treating a post-trial motion to tax costs as a non-dispositive matter under 28 U.S.C. § 636(b)(1)(A)).

The Court has considered Mr. Bianchi's objections *de novo* and made an independent review of the record. The Magistrate Judge's findings of fact and conclusions of law are not clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); Fed. It Civ. P. 72(a) ("The district judge ... shall modify or set aside any portion of the magistrate judge's order [on a pretrial matter not dispositive of a claim or defense of a party] found to be clearly erroneous or contrary to law."). For example, the Court agrees with Magistrate Judge Bandstra's conclusion that the "common

benefit" exception to the American Rule (against generally awarding victorious litigants their attorney's fees) does not apply in this case. *See, e.g., Rogers v. Air Line Pilots Ass'n, Int'l,* 988 F.2d 607, 616 (5th Cir. 1993) ("A class of two, where both are named parties and both immediately benefit as a result of the verdict and shared the cost of obtaining it, is not a 'class' for 'common benefit' purposes."). The Court also agrees that the proper measure of the attorney's fees award to make Mr. Bianchi whole for Local 390's failure to represent him is the contingency fee to which he is contractually obligated, not a fee based on the lodestar method. *See Lampkin v. UAW,* 154 F.3d 1136, 1148 (10th Cir. 1998) ("Here . . . the rationale for recovery of fees as damages is making the employee whole. This is achieved by compensating the client for the fees actually incurred under the contract with the lawyer.").

After careful consideration of the parties' written submissions, the record, and the applicable law, it is hereby **ORDERED AND ADJUDGED** that Magistrate Judge Bandstra's July 1, 2004 Order [D.E. 231] is **AFFIRMED** and **ADOPTED** in whole.

DONE AND ORDERED in Chambers at Miami, Florida this 21 day of December, 2004.

s/ Cecilia M. Altonag
CECILIA M. ALTONAG
UNITED STATES DISTRICT JUDGE

APPENDIX C — SECOND AMENDED FINAL JUDGMENT ON JURY VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED AND FILED NOVEMBER 12, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-21417-CIV-ALTONAGA/Bandstra

AMADEO BIANCHI,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, LOCAL 390, a labor organization; and ROADWAY EXPRESS, INC., a foreign corporation,

Defendants.

SECOND AMENDED FINAL JUDGMENT ON JURY VERDICT[1]

THIS CAUSE came on for trial before the Court and a jury, the Honorable Cecilia M. Altonaga, District Judge,

1. The Final Judgment on Jury Verdict is amended pursuant to the Orders dated February 26, 2004 granting Plaintiff's Motion to Amend or Alter Final Judgment and November 12, 2004 granting Plaintiff's Motion for Clarification of Judgment.

presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED that

1. Defendant, International Brotherhood of Teamsters, Local 390 ("Local 390"), acted in an arbitrary, discriminatory, or bad faith manner in representing Plaintiff, Amadeo Bianchi's ("Bianchi") grievance;

2. The arbitrary, discriminatory, or bad faith conduct of Local 390 "seriously undermined" the integrity of the grievance process;

3. Defendant, Roadway Express, Inc. ("Roadway"), terminated Bianchi without just cause; and it is further

ORDERED AND ADJUDGED that, pursuant to the parties' Stipulation of Damages and Remedy [D.E.126], and subject to Defendants' rights to file post-trial motions and/or to appeal, and subject to Defendants' right to request a stay during the Court's consideration of such post-trial motions and/or during the pendency of any appeal(s),

1. The damages payable in this case to Bianchi are $67,632.31,[2] plus prejudgment interest thereon at the

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2. This amount reflects the following: (1) lost wages of $100,460.08; (2) COBRA reimbursement of $18,920.60; (3) pension contributions of $15,620.00: and (4) mitigation setoff of $67,358.35. The $15,620.00 in pension contributions will be paid by Defendants directly to the Central States Southeast and Southwest Areas Health

(Cont'd)

rate of 6% per annum or .0001644 per day as provided by Florida law commencing from October 30, 2001 (the date of Plaintiff's wrongful termination), and Bianchi's costs of action;

2. Within fourteen (14) business days of this Judgment, Bianchi will be reinstated to his former position of employment with Roadway and will be afforded all seniority, privileges, and benefits, as if he had never been dismissed from employment at Roadway;

3. Postjudgment interest shall accrue on this Judgment pursuant to 28 U.S.C. § 1961; and

4. The Court shall retain jurisdiction to determine entitlement to, and amount of, Bianchi's attorney's fees.

(Cont'd)

Welfare and Pension Funds for the benefit of Amadeo Bianchi in accordance with the eligibility criteria, payment provisions, and other rules set forth in the applicable plan documents.

Appendix C

DONE AND ORDERED in Chambers at Miami, Miami-Dade County, Florida, this 12 day of November, 2004.

s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 1, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 02-CV-21417-CIV-ALTONAGA/BANDSTRA

AMADEO BIANCHI,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, LOCAL 390, a labor organization, and ROADWAY EXPRESS, INC., a foreign corporation,

Defendants.

ORDER

THIS CAUSE is before the Court on Plaintiff, Amadeo Bianchi's (1) Motion for Award of Costs and Litigation Expenses (D.E. 167), filed on March 9, 2004; (2) Motion for Award of Attorneys' Fees (D.E. 168), filed on March 9, 2004; (3) First Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses of Litigation (D.E. 177), filed on March 22, 2004; and (4) Second Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses of Litigation (D.E. 225), filed on June

4, 2004.[1] On March 11, 2004, these matters were referred to United States Magistrate Judge Ted E. Bandstra by the Honorable Cecilia M. Altonaga for a Final Order pursuant to 28 U.S.C. § 636(b). Having carefully considered these motions, all attachments thereto, all responses and replies thereto, the court file and applicable law, it is hereby

ORDERED AND ADJUDGED as follows:

(1) Amadeo Bianchi's Motion for Award of Costs and Litigation Expenses (D.E. 167) is GRANTED IN PART in the amount of $11,230.46, jointly and severally, against defendant International Brotherhood of Teamsters, Chauffeurs, and Warehousemen, Local 390 and defendant Roadway Express Inc., as reasonable, statutorily permissible costs incurred in this litigation.

(2) Amadeo Bianchi's Motion for Award of Attorneys' Fees (D.E. 168) is GRANTED IN PART in the amount of $27,052.92 against defendant International Brotherhood of Teamsters, Chauffeurs, and Warehousemen, Local 390.

(3) Amadeo Bianchi's First Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses

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1. Defendant Roadway Express, Inc.'s Motion to Strike, in Part, Plaintiff's Motion for Award of Attorneys' Fees and Plaintiff's First Verified Motion for Award of Supplemental Attorneys' Fees (D.E. 191), filed on April 8, 2004, and Defendant Roadway Express, Inc.'s Motion to Strike and Memorandum In Opposition to Plaintiff's Second Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses of Litigation (D.E. 228), filed on June 10, 2004 are DENIED AS MOOT.

of Litigation (D.E. 177) is DENIED with regard to the requested attorneys' fees but GRANTED IN PART with regard to the costs requested in that all permissible costs have been added to the amount awarded in paragraph (1) of this Order.

(4) Amadeo Bianchi's Second Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses of Litigation (D.E. 225) is DENIED with regard to the requested attorneys' fees but GRANTED IN PART with regard to the costs requested in that all permissible costs have been added to the amount awarded in paragraph (1) of this Order.

BACKGROUND

On March 9, 2004, plaintiff Amadeo Bianchi entered into a contingency fee agreement with his counsel which provides, *inter alia*, that the "Client agrees to pay the Firm forty percent (40%) of any recovery effectuated on Client's behalf." (D.E. 168). On May 9, 2002, plaintiff filed a complaint against defendant International Brotherhood of Teamsters, Chauffeurs, and Warehousemen, Local 390 ("Local 390" or "Union") for breach of its duty of fair representation, and against Roadway Express Inc. ("Roadway") for breach of a collective bargaining agreement, pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In his complaint, plaintiff claimed that Roadway violated Section 301 by discharging him without just cause, and that Local 390 breached its duty of fair representation by failing to properly handle plaintiffs ensuing grievance.

Appendix D

On September 22, 2003, a jury found that Roadway terminated Bianchi without just cause in violation of the collective bargaining agreement, and that Local 390 breached its duty to fairly represent him in his grievance on the wrongful termination. Pursuant to a prior stipulation among the parties regarding damages representing back pay and benefits, Bianchi was awarded $67,632.31 and reinstated. D.E. 126. On October 16, 2003, the district court entered its Final Judgment in favor of plaintiff. Bianchi then filed a Motion to Alter or Amend Judgment, asking the Court to retain jurisdiction to determine whether and to what extent attorneys' fees and costs should be granted. The Court granted said motion and entered its Amended Final Judgment on Jury Verdict on February 26, 2004. The instant motions were brought pursuant to the Amended Final Judgment.

On June 8, 2004, this Court heard oral argument on plaintiff's numerous motions for fees and costs. In his Motion for Award of Costs and Litigation Expenses, Bianchi requests an award in the amount of $13,805.47, which he subsequently increased to $14,699.06. In his Motion for Award of Attorneys' Fees, plaintiff requests an award in the amount of $226,988.50, which he subsequently increased to $248,338.50.[2]

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2. On March 22, 2004, Bianchi filed his First Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses of Litigation (D.E. 177) seeking $144.16 in additional costs and litigation expenses and $5,895.00 in additional attorneys' fees.

On June 4, 2004, Bianchi filed his Second Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses of Litigation (D.E. 225) seeking $749.43 in additional costs and litigation expenses and $15,455.00 in additional attorneys' fees.

Appendix D

Defendants Local 390 and Roadway oppose plaintiff's motions for costs and litigation expenses on the ground that any such award should be limited to those costs reasonably incurred and enumerated in 28 U.S.C. § 1920. Defendants also oppose plaintiff's motions for attorneys' fees on the grounds that plaintiff is not entitled to attorneys' fees under the Labor Management Relations Act, and that he waived any claim to attorneys' fees upon entering into a stipulation with defendants as to a potential damage award flowing from back pay and benefits. However, if attorneys' fees are awarded, defendants argue that such fees should be imposed only upon Local 390 and in the amount stipulated in the contingency fee agreement between plaintiff and his counsel.

LEGAL ANALYSIS

A. *Attorneys' Fees*

1. *Entitlement to Attorneys' Fees*

Unlike other federal labor statutes,[3] Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not specifically authorize the granting of attorneys' fees for violations thereof. Thus, the "American Rule," which dictates that each party must pay its own attorneys' fees regardless of the outcome of the litigation, applies. *See Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y*, 421 U.S. 240, 247 (1975). However, courts have awarded attorneys' fees in hybrid Section 301/duty of fair representation cases based on three exceptions to the "American Rule": (1) where the losing party

3. For example, Title VII of the Civil Rights Act of 1964 or the Fair Labor Standards Act.

is found to have litigated in bad faith; (2) where the successful litigant confers a common and substantial benefit upon an identifiable class of individuals who did not participate in the litigation; or (3) so the Union is required to pay its share of the cost of obtaining a fair resolution of the grievance against the employer, so that the employee is made whole. *Rogers v. Air Line Pilots Ass'n Intl*, 988 F.2d 607, 615-16 (5th Cir. 1993). These exceptions are supported by the general proposition that courts may exercise equitable power to award attorneys' fees when justice so requires. *See Hall v. Cole*, 412 U.S. 1, 4-5 (1973). In the instant case, plaintiff argues that attorneys' fees should be granted under either the "common benefit" exception or the "make whole" exception.

a. *The "Common Benefit" Exception*

In arguing for the applicability of the "common benefit" exception, plaintiff cites the Supreme Court's opinion in *Hall v. Cole* for the proposition that said exception applies to "cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.'" *Id.* at 5 (quoting *Mills v. Elec. Auto-Lite*, 396 U.S. 375 (1970)). Plaintiff further argues that a fee award in Section 301 cases is appropriate because it benefits the union and its members as a whole regardless of the provable amount of damages to the plaintiff, since a liability verdict recognizes union deprivation of the employee's due process rights. *See Cruz v. Local Union No. 3, IBEW*, 34 F.3d 1148, 1158-59 (2nd Cir. 1994).

The undersigned finds this argument unpersuasive because this case did not bestow any common benefit upon Local 390. Indeed, any incentive to change union policy following the resolution of plaintiff's civil action is only ancillary to Bianchi's personal recovery. *See Erkins v. Bryan*, 785 F.2d 1538, 1548-49 (11th Cir. 1986) (citing *Shimman v. Int'l Union of Operating Eng'rs*, 744 F.2d 1226 (6th Cir. 1984)). Plaintiff fails to convincingly demonstrate how Local 390's membership as a whole was benefitted by either his reinstatement at Roadway Express or through his awarded back pay. Further, it appears that this action only served to remedy Bianchi's due process rights and not those of any other member of Local 390's membership.

Bianchi's reliance on *Cruz* is misplaced as the facts of that case are distinguishable from those of the instant case. *Cruz*, 34 F.3d at 1148. In *Cruz*, a union failed to challenge the actions of an employer who closed a plant and laid off nearly 100 workers. Thus, the plaintiffs' victory in *Cruz* benefitted all of their co-workers. In contrast, Bianchi's victory did not directly affect any other Roadway employees other than those who *lost* their seniority position because of plaintiff's reinstatement. Accordingly, the undersigned finds that the "common benefit" exception to the American Rule does not support an award of attorneys' fees in this case. *See Rogers*, 988 F.2d at 616 (holding that a class of two, where both parties immediately benefit as a result of the verdict and shared the costs of obtaining it, is not a "class" for "common benefit" purposes).

b. *The "Make Whole" Exception*

The "make whole" exception provides that where there is a legal duty to provide representation, if the representation is wrongfully withheld, the cost of substitute representation in pursuit of a Section 301 claim against an employer can be recoverable as compensatory damages. *Lampkin v. Int'l Union, United Auto, Aerospace & Agric. Implement Workers of America*, 154 F.3d 1136, 1141 (10th Cir. 1998); *Ames v. Westinghouse Elec. Corp.*, 864 F.2d 289, 293 (3d Cir. 1988). In *Vaca v. Sipes*, the United States Supreme Court recognized that in situations where a plaintiff suffers loss in the form of fees to be paid to a privately retained attorney, liability must be appropriated between the employer and the union according to the damage caused by the fault of each. *Vaca v. Sipes*, 386 U.S. 171, 197 (1967); *See also Del Casal v. E. Airlines, Inc.*, 634 F.2d 295, 301 (5th Cir. Unit B 1981).[4] If an employee proves that both the union and the employer breached their respective duties (representation and collective bargaining agreement), a court may order the union to pay attorney's fees and costs incurred by the employee in his suit against the employer. *See Seymour v. Olin Corp.*, 666 F.2d 202, 214 (5th Cir. Unit B 1982)[5] (allowing recovery of plaintiffs attorneys' fees and costs from a union and recognizing that such an award was a fair measure of the difficulty and expense of being reinstated to his proper position with his employer and collecting all of the back pay

4. This case is binding precedent on this Court pursuant to *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

5. Even though this case was decided in 1982, it is binding precedent on this Court pursuant to *Bonner*, 661 F.2d 1206.

and benefits owed him as a result of the union's failure to properly process his grievance); *See also Del Casal*, 634 F.2d at 301(limiting the plaintiff's recovery from the union to fees and costs associated with his grievance against his employer, thereby excluding fees and costs associated with his suit against the union for breach of the duty of fair representation). The *Seymour* court went on to note that awards of attorneys' fees and costs, which will often be substantial, provide an appropriate incentive to ensure that unions will diligently pursue their duty of fair representation. *Seymour*, 666 F.2d at 215.

In the instant case, Local 390 was found to have breached its duty of fair representation and plaintiff was forced to seek private counsel in order to vindicate his rights under the collective bargaining agreement. Thus, Bianchi should be reimbursed in the form of compensatory damages for attorneys' fees incurred as a result of Local 390's breach. *See Seymour*, 666 F.2d at 212-15; *Del Casal*, 634 F.2d at 301. This judgment does not amount to an entitlement *per se*. Rather, it is an equitable ruling that falls in line with existing precedent by recognizing that plaintiff should not have to bear the burden of having his recovery lessened because of Local 390's failure to provide proper representation.

Defendant Local 390 argues that neither *Seymour* nor *Del Casal* apply here. According to Local 390, *Seymour* is inapplicable because the court of appeals did not indicate the "basis" for its award of attorneys' fees. However, Local 390 cannot and does not dispute that an award of attorneys' fees was granted in *Seymour*. It is further argued that

Del Casal is inapplicable because the cost of an attorney was a fact peculiar to that case since the alleged breach by the union was its refusal to allow the union's attorney to represent the plaintiff at union expense. The undersigned finds both of these arguments unpersuasive.

Although the court in *Seymour* did not spell out the precise theory upon which it based its award of attorneys' fees, it did indicate the importance of having a policy which provides an appropriate incentive to ensure that unions will diligently pursue their duty of fair representation. *See Seymour*, 666 F.2d at 215. Even though the court only reviewed the district court's attorneys' fees award to determine whether it was excessive as a matter of law, it did so under the premise that attorneys' fees would provide the appropriate incentive for the promulgation of such policy. *Id.* Hence, the undersigned finds that the court in *Seymour* did provide sufficient guidance to render that case applicable to the instant circumstances.

Likewise, Local 390's attempt to distinguish *Del Casal*, from the instant case is unconvincing. In *Del Casal*, upon determining that a union breached its duty of fair representation, the court limited the plaintiff's recovery from the union to fees and costs associated with his grievance against his employer, thereby excluding fees and costs associated with his suit against the union for breach of the duty of fair representation. This outcome came about under a factual scenario and underlying applicable law similar to this case. In fact, Local 390's own attorney conceded during oral argument that "the *Del Casal* case is what is controlling

here."[6] Accordingly, the undersigned finds that *Del Casal is* binding and applicable.

Defendants also argue that Bianchi waived any claim to attorneys' fees by entering into the $67,632.31 damage stipulation. *See* D.E. 126. The defendants contend that attorneys' fees are awardable in Section 301 cases only as an item of the plaintiff's damages against the union. *See Wilson v. Intl Bhd. Of Teamsters*, 83 F.3d 747, 753 (6th Cir. 1996). Local 390 and Roadway argue that the stipulation was a complete measure of Bianchi's recovery because it made no reference to any additional damages which may be awarded at a later date. Additionally, defendants maintain that plaintiff never once referenced attorneys' fees in negotiating said stipulation and even expressly stated in court that no other additional elements of damages other than back pay and benefits were sought. Thus, defendants claim that an award for attorneys' fees would constitute a sum in addition to the agreed-upon damages amount. Local 390 notes that it would not have agreed to the $67,632.31 figure had it known that plaintiff intended to seek attorneys' fees.

The undersigned finds this argument unpersuasive. Because this Court finds that attorneys' fees should be awarded only against Local 390 for the reasons discussed below, the question of whether or not Roadway was put on notice of plaintiff's intent to seek attorneys' fees is irrelevant. Rather, it is Local 390's knowledge that is of prime import in the instant case. The record clearly reveals that defendant Local 390 was aware that plaintiff would seek

6. Transcript of oral argument for Plaintiff's Motion for Attorneys' Fees and Costs, p 22.

attorneys' fees since Bianchi specifically requested such fees against Local 390 in his Amended Complaint (D.E. 5). The issue of attorneys' fees was also raised in the Joint Pretrial Stipulation (D.E. 55) submitted by all parties. "Matters stipulated to in a pretrial order are binding on the parties unless modified and normally cannot be objected to on appeal. [citations omitted]. Pretrial orders control the subsequent course of action unless modified to prevent manifest injustice. Fed.R.Civ.P. 16." *Feazell v. Tropicana Products, Inc.*, 819 F.2d 1036, 1040 (11th Cir. 1987). Defendant Local 390 has provided no evidence to suggest that the Joint Pretrial Stipulation was modified at any time during the course of the trial. Similarly, Local 390 has failed to provide any explanation as to how it was not aware of plaintiff's intent to seek attorneys' fees, given the existence of the Joint Pretrial Stipulation which made plaintiff's intentions clear. The record shows that the $67,632.31 damage stipulation entered into by all parties was meant to compensate plaintiff for back pay and benefits, and represents a final fixed sum only with respect to back pay and benefits. Because no specific mention was made as to attorneys' fees at the time that the damage stipulation was entered into, it is reasonable to conclude that the attorneys' fees claim asserted against Local 390 in the Amended Complaint and the Joint Pretrial Stipulation was not waived. Hence, the undersigned finds that plaintiff has not waived his ability to seek attorneys' fees against Local 390.

2. *Distribution of Attorneys' Fees*

"[D]amages attributable solely to the employer's breach of contract should not be charged to the union, but increases

if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Vaca*, 386 U.S. at 197-98. A grievant's attorneys' fees represent increases in the injury caused by the union's refusal to process the grievance. Thus, a Section 301 plaintiff's ability to obtain attorneys' fees is generally limited to a recovery from the union of the fees incurred in the pursuit of plaintiff's Section 301 claim for breach of the collective bargaining agreement. *Ames*, 864 F.2d at 293; *Wilson v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers of America, AFL-CIO*, 83 F.3d 747, 754 (6th Cir. 1996); *Bennett v. Local Union No. 66, Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC*, 958 F.2d 1429, 1440 (7th Cir. 1992). This limitation is justified by the notion that had the union satisfied its duty in the grievance procedure, the employee would not have incurred the expense of having to bring suit for contract violations. *See Lampkin*, 154 F.3d at 1136.

In the instant case, the jury found that Local 390 breached its duty of fair representation and that Roadway breached its collective bargaining agreement. Thus, plaintiff's recovery of attorneys' fees is limited to an award against Local 390 for fees incurred in pursuit of plaintiff's Section 301 claim against Roadway.

However, an employer can be held jointly and severally liable with a union for the plaintiff's damages and attorneys' fees, if there is a finding of collusion or conspiracy between the employer and the union. *Vaca*, 386 U.S. at 197 n.18; *Bennett*, 958 F.2d at 1440-41; *Allen v. Allied Plant Maint. Co. of Tennessee*, 881 F.2d 291, 298-99. Because the record

does not show any convincing evidence of collusion or conspiracy between Local 390 and Roadway, the undersigned declines to hold the defendants jointly and severally liable for attorneys' fees here.

3. *Amount of Attorneys' Fees*

"[A]ttorney's fees are recoverable as damages against union defendants in Section 301 actions." *Wilson*, 83 F.3d at 753. Where the rationale for recovery of fees as damages is making the employee whole, the employee must be compensated "for the fees actually incurred under the contract with the lawyer." *Lampkin*, 154 F.3d at 1148 (reversing judgment as to the amount of damages awarded against union and remanding for the district court to determine the amount of fees actually paid or incurred and to award damages in that amount). Thus, a Section 301 plaintiff can only recover those attorneys' fees that he actually incurs and is required to pay to his counsel. *Id.*

In the instant case, pursuant to the contingency fee agreement, plaintiff is required to pay forty percent (40%) of his settlement in attorneys' fees.[7] *See* D.E. 168. For this reason and consistent with existing precedent, this Court awards plaintiff attorneys' fees in the amount of $27,052.92. This sum represents forty percent (40%) of the $67,632.31 damage stipulation entered into by all parties and is the amount necessary to make plaintiff whole for attorneys' fees

7. During oral argument, plaintiff's counsel admitted that plaintiff is only obligated to pay forty percent (40%) of his recovery as attorneys' fees. *See* Transcript of oral argument for Plaintiff's Motion for Attorneys' Fees and Costs, pgs. 13-14.

incurred as a result of Local 390's breach of its duty of fair representation.

Plaintiff makes several arguments as to why all reasonable attorneys' fees, in this case $248,338.50, should be awarded rather than only those for which the plaintiff is held responsible under the contingency fee agreement. First, plaintiff asserts that in Section 301 hybrid actions, the proper measure of attorneys' fees awardable against a union as damages flowing from a breach of duty of fair representation is a "reasonable fee," not limited to the amount in the attorney-client fee agreement, where such agreement accounted for plaintiff's limited assets and income. *See Bygott v. Leaseway Transp. Corp.*, 637 F. Supp. 1433 (E.D. Pa. 1986), *vacated* on *other grounds*, 125 LRRM 3027 (3d Cir. 1987). He argues that fees "reasonably incurred" must be defined as more than contracted for in a contingency fee agreement. *See Bennett*, 958 F.2d 1429 (7th Cir. 1992).[8]

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8. Plaintiff also argues that *Zuniga v. United Can Co.*, 812 F.2d 443, 453-55 (9th Cir. 1987) is also persuasive. However, *Zuniga* is clearly distinguishable from the instant case. In *Zuniga*, the Ninth Circuit was faced with having to interpret an ambiguous contract which stated that counsel would charge $80.00 per hour, but did not state that the plaintiff would pay such an hourly rate. In this case, the contingency fee agreement unambiguously states that "as compensation for its services pursuant to the contingency fee agreement, Client agrees to pay the Firm forty percent (40%) of any recovery effectuated on Client's behalf. The forty percent (40%) shall be payable from the gross proceeds (before costs and other deductions are taken out) of any recovery." *See* D.E. 168. Moreover, during oral argument, plaintiff's counsel affirmed that plaintiff is only obligated to pay forty percent (40%) of his recovery as attorneys'

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However, *Bygott* is distinguishable from this case because the court there awarded attorneys' fees to a group of plaintiffs under the "common benefit" exception. In contrast, this Court awards plaintiff his attorneys' fees under the "make whole" exception. Hence, the undersigned cannot award a larger sum than is necessary to place plaintiff in as good a position as he would have been in had Local 390 not breached its duty of fair representation. Because the rationale for recovery of fees as compensatory damages is making the employee whole, plaintiff must be compensated only for those fees that he is bound to pay out of his recovery. *Lampkin*, 154 F.3d at 1148. This Court cannot expand the "make whole" exception to include both the plaintiff and his attorney. *See Id.* at 1141. Further, the undersigned finds that plaintiff's strained interpretation of *Bennett* is not supported by that case or the theory under which this Court awards attorneys' fees. Although *Bennett* did award reasonably incurred attorneys' fees to the plaintiff under the "make whole" theory, there was no contingency fee agreement to limit the plaintiff's liability to her attorneys. Thus, that court awarded a reasonable sum to cover "proximate consequential damages . . . [resulting from] . . . the union's failure to provide representation." *Bennett*, 958 F.2d at 1440. Here, however, a contingency fee agreement limits Bianchi's liability to his attorneys. Thus, by awarding attorneys' fees in the amount that plaintiff is obligated to pay to his attorneys, this Court, like the court in *Bennett*, is making the plaintiff whole by

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fees. *See* Transcript of oral argument for Plaintiff's Motion for Attorneys' Fees and Costs, pgs. 13-14. Finally, none of the parties here challenged the clarity and validity of the contingency fee agreement present in the instant case.

awarding a sum that covers the consequential damages resulting from the union's failure to provide proper representation.

Plaintiff also cites the United States Supreme Court decision in *Blanchard v. Bergeron* for the proposition that "a contingent-fee contract does not impose an automatic ceiling on an award of attorneys' fees, and to hold otherwise would be inconsistent with the statute and its policy and purpose." *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989). However, *Blanchard* is not applicable to the instant case because it is specifically based on a recovery for civil rights litigation under 42 U.S.C. § 1988. Although 42 U.S.C. § 1988 contains a prevailing plaintiff statutory fee-shifting provision, no such provision is provided within the National Labor Relations Act. Thus, even though a contingency fee agreement may not impose an automatic ceiling in cases arising under 42 U.S.C. § 1988, the same cannot be said for claims arising under Section 301.

Bianchi further argues that limiting attorneys' fees to those agreed upon in the contingency fee agreement will have a chilling effect upon the congressional policy underlying the Taft-Hartley Act, which contains Section 301. According to plaintiff, this policy is designed to ensure harmonious labor relations and the resultant uninterrupted flow of commerce throughout the United States through collective bargaining, Plaintiff argues that if courts fail to award reasonable attorneys' fees, then few if any attorneys will take these sort of cases and potential plaintiffs will be left without recourse. This, according to plaintiff, may result in the breakdown of the collective bargaining mechanism envisioned by Congress,

as well as of the industrial stability sought under the National Labor Relations Act.

Although this Court recognizes that plaintiff's counsel expended considerable time and effort prosecuting this case, and that an award limiting attorneys' fees to the amount actually required under the contingency fee agreement may discourage some attorneys from taking such cases under similar financial arrangements in the future, the undersigned is bound by existing statutes and case law in making a final determination. Plaintiff's policy argument, while persuasive, fails to provide a sufficiently compelling reason for this Court to depart from existing precedent. Indeed, no reason is provided as to why the National Labor Relations Act is silent on the issue of fee shifting and makes no provision for the award of full fees and costs to prevailing plaintiffs as requested here. The task of this Court is to interpret and apply existing law. Moreover, given Congress' history of enacting specific fee shifting provisions,[9] it is reasonable to conclude that if Congress intended to provide a reasonable fee in excess of a plaintiff's obligation to his attorney in a Section 301 case, Congress would have so provided within the National Labor Relations Act or through subsequent amendments. Given the lack of such affirmative steps by Congress, this Court cannot act otherwise.[10]

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9. Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act are two examples of where Congressional policy was actively pursued through the implementation of specific fee shifting provisions.

10. Plaintiff also argues that it would be "ludicrous for anyone . . . to believe that plaintiff's counsel would anticipate receiving only forty percent (40%) of the equitable award of lost pay and benefits as a

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Appendix D

B. *Costs and "Litigation Expenses"*

Plaintiff also requests costs and "litigation expenses" in the amount of $14,699.06 for filing fees, witness fees (deposition and trial), service of process fees, deposition and trial transcripts, duplication costs, mediation, federal and airborne express, postage, online research, attorney travel and subsistence, long distance/faxes, and courier service.

Specific costs which may be awarded to the prevailing party are set forth in Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920. These include: (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under section 1923 of this title; (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title. 28 U.S.C. § 1920. Generally, "the trial court in the exercise of sound discretion may tax all reasonable expenses incurred by a prevailing party under the [six] headings listed in section 1920 and Rule 54(d)." *Pricipe v. McDonald's Corp.*, 95 F.R.D. 34, 36 (E.D. Va. 1982). Although Rule 54(d) gives federal courts discretion to deny

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fee for litigating" such a difficult case. *See* Plaintiff Amadeo Bianchi's Reply In Support Of Motion for Award of Attorneys' Fees as to Teamsters Local 390 at 10. Although the Court does not reject this contention, the undersigned notes that the issue of what Bianchi's attorneys anticipated is irrelevant.

costs under these subsections, it does not authorize courts to award prevailing parties costs beyond the statutory levels. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2492 (1987). Thus, this Court will disallow any costs which are not specifically provided for in 28 U.S.C. § 1920.

Plaintiff requests two categories of costs: (1) those specifically enumerated by section 1920 and (2) those defined as "litigation expenses" which are not recoverable under section 1920.

1. *Costs Recoverable Under Section 1920*

Reviewing the specific cost items requested under section 1920, the Court finds most of these costs to be reasonable and recoverable expenses. Indeed, defendants only challenge plaintiff's request for costs for copying expenses and witness fees.

a. *Copying Costs*

Defendants argue that plaintiff's request for copying costs should be denied because the bill of costs does not distinguish between the copies produced to the Court or opposing counsel from those produced for the convenience of his attorneys. Indeed, only photocopying "necessary for the maintenance of [an] action" can be recovered under 28 U.S.C. § 1920(4). *See Allen v. United States Steel Corp.*, 665 F.2d 689, 697 n.5 (5th Cir. Unit B 1982). Copies attributable to discovery, copies of pleadings, correspondence, documents tendered to the opposing party,

copies of exhibits, and documents prepared for the Court's consideration are recoverable. *Desisto Coll., Inc. v. Town of Howey-In-The-Hills*, 718 F. Supp 906, 913 (M.D. Fla. 1989) (citing *Fressell v. AT&T Tech., Inc.*, 103 F.R.D. 111, 115-16 (N.D. Ga. 1984)). As stated in *Freeman v. Dole*, 609 F. Supp. 541, 544 (D.D.C. 1985), "the issue is not whether such costs are recoverable, but whether the costs upon consideration were reasonably expended." Copies obtained only for the convenience of counsel are not recoverable. *Desisto Coll., Inc.*, 718 F. Supp at 913 (citing *Allen v. Freeman*, 122 F.R.D. 589, 591 (S.D. Fla. 1988)); *Cappeletti Bros., Inc. v. Broward County*, 754 F. Supp. 197, 198 (S.D. Fla. 1991). Extra copies of filed papers, correspondence, and copies of cases are considered obtained only for the convenience of counsel. *Desisto Coll., Inc.*, 718 F. Supp at 913 (citing *Fressell*, 103 F.R.D. at 116).

Bianchi seeks reimbursement for the cost of outside copying services totaling $2,744.33 and for that of copies made by his counsel at the rate of 25 cents per page totaling $1,019.50. In her affidavit, plaintiff's attorney notes that all "photocopying was necessitated in creating documents for filing in court with service on all parties; exhibits for deposition and trial; trial materials and the like."[11] Counsel affirmed under oath that all photocopying done was reasonable and necessary to the prosecution of the case. Plaintiff also attached documentation of all photocopy charges including the number of copies, the cost for the copies and numerous references to the types of documents copied.

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11. *See* Exhibit B of Plaintiff Amadeo Bianchi's Motion for Award of Costs and Litigation Expenses and Incorporated Memorandum of Law.

The undersigned finds that plaintiff's documentation along with his counsel's affidavit are sufficient to demonstrate that the duplication costs were necessary for this litigation and, thus, awards copying costs in the amount of $3,763.83.

b. *Witness Fees*

According to Roadway, witness fees are taxable as costs only where the witness is necessary for the party's case and the costs are reasonable. Roadway argues that plaintiff's request for witness fees should be denied because it lists unspecified witness fees which make it impossible to discern whether the witnesses for whom Bianchi seeks fees were necessary and whether the corresponding witness fees are reasonable. Roadway adds that Bianchi seeks fees for some witnesses that were neither deposed nor called to trial.

Witness fees are governed by the provisions of 28 U.S.C. § 1821(b) which allows for a witness to be paid an attendance fee of $40.00. Witness fees, including expert witness fees, are not compensable beyond the statutorily mandated attendance fee of $40.00 per witness. *Nat'l Bancard Corp. v. Visa, U.S.A., Inc.*, 112 F.R.D. 62, 68-69 (S.D. Fla. 1986); *Kivi v. Nationwide Mutual Ins.*, 695 F.2d 1285, 1289 (11th Cir. 1983); *Manriquez v. Manuel Diaz Farms, Inc.*, 2002 WL 1050331 (S.D. Fla.). The provisions of 28 U.S.C. § 1821 allow the award of witness fees for any witness in attendance for an authorized deposition or trial, regardless of whether or not it was obtained for use in the case. Plaintiff requests a $42.00 witness fee for appearances by Alix Salvant, Shawn Becker, Kai Wong, Geraldine Pope, Rhonda Buroker, John Chase, Craig Henschel, Michael Wilson, Gerome Daniels,

Don Marr, Bud Rowland, Victor Tamayo and Chris Clark. In reviewing the record and court file, the undersigned finds that these witnesses had or potentially had relevant information regarding this case. However, because the witness fees sought are in excess of the statutorily mandated $40.00 attendance fee listed in 28 U.S.C. § 1821(b), each witness will be awarded $40.00. A $40.00 witness fee will also be awarded for Jeffrey Ellison's appearance. Plaintiff also requests a $7.00 fee for appearances at deposition by Kai Wong, Shawn Becker, and Rhonda Buroker. This Court will award $7.00 for each such appearances pursuant to 28 U.S.C. § 1821(b). Accordingly, the undersigned awards witness fees in the total amount of $581.00.[12]

c. *Miscellaneous Costs*

Bianchi also requests $150.00 for filing fees, $890.00 for service of process fees and $5,845.63 for deposition and trial transcripts.[13] These sums are not challenged by

12. In his Motion for Award of Costs and Litigation Expenses and Incorporated Memorandum of Law, plaintiff requested witness fees in the amount of $565.00, Having reviewed all supporting documentation, the undersigned finds that plaintiff's calculation of witness fees was in error. The amount awarded reflects a true and correct calculation of witness fees based upon all supporting documentation.

13. Under 28 U.S.C. § 1920(1), costs for filing and service of process fees are recoverable. Likewise, under 28 U.S.C. § 1920(2), the costs of obtaining transcripts "necessarily obtained for use in the case" are taxable. *Nat'l Bancard Corp.*, 112 F.R.D. at 66 (citations omitted). To be taxable, the transcripts need to be "reasonably

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defendants. The undersigned finds these costs to be reasonable and recoverable expenses under 28 U.S.C. § 1920 and existing case law.

Plaintiff requests $267.67 in mediation costs as costs under section 1920. However, the undersigned finds that Bianchi is not entitled to such costs because they are not permitted under section 1920. *See Lake v. Hartford Life and Accident Ins. Co.*, 2004 WL 1253784 (M.D. Fla.); *Manriquez*, 2002 WL at 1050331.

For the above stated reasons, the Court hereby finds that plaintiff is entitled to its taxable costs in the total amount of $11,230.46 for which defendants Local 390 and Roadway are jointly and severally liable.

2. *"Litigation Expenses"*

Plaintiff also seeks additional costs not enumerated in 28 U.S.C. § 1920 and refers to them as "litigation expenses" under the "make whole" exception to the "American Rule." Specifically, plaintiff requests $54.85 for Federal Express, $12.45 for Airborne Express, $83.55 for postage, $1,340.49 for online research, $792.25 for attorney travel and subsistence, $3.65 for long distance/faxes and $893.63 for

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necessary." *Barber v. Ruth*, 7 F.3d 636 (7th Cir. 1993). Transcripts of depositions of witnesses expected to be called at trial are "reasonably necessary." *Allen*, 665 F.2d at 697; *Nat'l Bancard Corp.*, 112 F.R.D. at 65-66. This is so regardless of whether the witnesses were actually called at trial or the case even made it to trial. *See Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993).

courier service. He does so by raising the same policy arguments already discussed in relation to the impact of contingency fee agreements upon attorneys' fees under Section 301 claims.[14] By equating civil rights cases and policy with the facts of the instant case, plaintiff attempts to persuade this Court that "the issue of which expenses are properly chargeable to the defendants . . . is not settled by reference to any pre-determined list of items. [Rather] [i]t is governed by the purposes of the governing statute and the nature and context of the specific litigation." *See Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1189 (11th Cir. 1983).

The undersigned finds this argument unpersuasive and declines to award the requested amounts. The purpose of the "make whole" exception is to provide a compensatory remedy for a union's failure to abide by its duty of fair representation. *See Lampkin*, 154 F.3d at 1141; *Ames*, 864 F.2d at 293. As discussed above, the "make whole" exception is geared toward the aggrieved employee and not his attorney. Given

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14. Plaintiff argues that the Court's refusal to award *full* costs and litigation expenses will have a chilling effect upon the Congressional policy underlying the Taft-Hartley Act, which contains Section 301. According to plaintiff, this policy is designed to ensure harmonious labor relations and the resultant uninterrupted flow of commerce throughout the United States through collective bargaining. Plaintiff contends that if courts do not award reasonable attorneys' fees and full costs, then few if any attorneys will take these sort of cases and potential plaintiffs will be left without recourse. This, according to plaintiff, may result in the breakdown of the collective bargaining mechanism envisioned by Congress, as well as of the industrial stability sought under the National Labor Relations Act.

this Court's duty to interpret and apply the law, and in light of both the National Labor Relations Act's silence on the issue of full fees and costs to prevailing plaintiffs, and Congress' history of enacting specific fee shifting provisions,[15] it is reasonable to conclude that if Congress intended on providing recovery of all costs to plaintiffs, it would have provided for same. Without explicit Congressional guidance, this Court cannot award costs in excess of the existing statutory provision, 28 U.S.C. § 1920, simply because of policy considerations which may or may not accurately predict past Congressional intent and possible future labor instability,

For the above stated reasons, the Court hereby denies plaintiff's request for costs which are not enumerated in 28 U.S.C. § 1920.

SUMMARY

For all of the foregoing reasons, the Court Orders that:

(1) Amadeo Bianchi's Motion for Award of Costs and Litigation Expenses (D.E. 167) is GRANTED IN PART in the amount of $11,230.46, jointly and severally, against defendant International Brotherhood of Teamsters, Chauffeurs, and Warehousemen, Local 390 and defendant Roadway Express Inc., as reasonable, statutorily permissible costs incurred in this litigation.

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15. Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act are two examples of where Congressional policy was actively pursued through the implementation of specific fee shifting provisions.

(2) Amadeo Bianchi's Motion for Award of Attorneys' Fees (D.E. 168) is GRANTED IN PART in the amount of $27,052.92 against defendant International Brotherhood of Teamsters, Chauffeurs, and Warehousemen, Local 390.

(3) Amadeo Bianchi's First Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses of Litigation (D.E. 177) is DENIED with regard to the requested attorneys' fees and GRANTED IN PART with regard to the costs requested in that all permissible costs have been added to the amount awarded in paragraph (1) of this Order.

(4) Amadeo Bianchi's Second Verified Motion for Award of Supplemental Attorneys' Fees and Reasonable Expenses of Litigation (D.E. 225) is DENIED with regard to the requested attorneys' fees and GRANTED IN PART with regard to the costs requested in that all permissible costs have been added to the amount awarded in paragraph (1) of this Order.

DONE AND ORDERED in Miami, Florida, this 1st day of July, 2004.

s/ Ted E. Bandstra
Ted E. Bandstra
United States Magistrate Judge

APPENDIX E — ORDER (DOCKET NO. 04-16596-BB) OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION(S) FOR REHEARING FILED MAY 9, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-16596-BB

AMADEO BIANCHI,

Plaintiff-Appellee

versus

ROADWAY EXPRESS, INC., a foreign corporation,

Defendant-Appellant,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, LOCAL 390, a labor organization,

Defendant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Appendix E

Before: HULL, MARCUS and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ James C. Hill
United States Circuit Judge

APPENDIX F — ORDER (DOCKET NO. 05-10192-BB) OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION(S) FOR REHEARING FILED MAY 9, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-10192-BB

AMADEO BIANCHI,

Plaintiff-Appellee

versus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN, LOCAL 390, a labor organization, ROADWAY EXPRESS, INC., a foreign corporation,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: HULL, MARCUS and HILL, Circuit Judges.

Appendix F

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ James C. Hill
United States Circuit Judge